

Bekins Moving & Storage Co., LLC and Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 542, International Brotherhood of Teamsters, AFL-CIO. Case 21-CA-32429

February 29, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On May 10, 1999, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.

ORDER

The complaint is dismissed.

David Mori, Esq., for the General Counsel.

Stephen J. Hirschfeld, Esq. (Curiale, Dellaverson, Hirschfeld, Kelly & Kramer, LLP), of San Francisco, California, for the Respondent.

Don Cruickshank, of San Diego, California, for the Union.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in San Diego, California, on February 16, 1999. The charge was filed

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although we agree with the judge that the Respondent did not violate Sec. 8(a)(5) and (1) by setting initial terms and conditions of employment for unit employees, we disavow the implication in his analysis that "arbitrary rules" govern a successor employer's provision of information to prospective employees.

In affirming the judge's finding that the Respondent did not violate the Act, we rely on the General Counsel's failure to establish that General Manager Bill Lovejoy was an agent of the Respondent in May 1997 and had authority at that time to advise employees, on behalf of the Respondent, that the Respondent would probably retain them following its purchase of the facility. In particular, there is no evidence that Lovejoy had, at that time, been offered and accepted any position with the Respondent or had been directed to contact employees on behalf of the Respondent. Compare: *Lemay Caring Center*, 280 NLRB 60, 66-67 (1986), *enfd. mem. sub nom. Dasal Caring Centers v. NLRB*, 815 F.2d 711 (8th Cir. 1987) (statements of acting administrator attributable to the successor employer because before the statements were made, the successor had hired her and authorized her to contact employees on its behalf regarding their employment with the successor). In addition to the foregoing, Member Hurtgen agrees with the judge's analysis under *NLRB v. Burns Security Services*, 406 U.S. 272, 294-295 (1972).

on December 12, 1997, by Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 542, International Brotherhood of Teamsters, AFL-CIO (the Union). On September 18, 1998, the Regional Director for Region 21 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging a violation by Bekins Moving & Storage Co., LLC (the Respondent) of Section 8(a)(5) of the National Labor Relations Act (the Act). The Respondent, in its answer, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, with an office and facility located in San Diego, California, is engaged in the moving and storage business. In the course and conduct of its business operations, the Respondent annually derives gross revenues in excess of \$50,000 for the transportation of freight from the State of California directly to points located outside the State of California. It is admitted, and I find, that the Respondent is engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issue raised by the pleadings is whether the Respondent, as a successor employer, has violated Section 8(a)(5) and (1) of the Act by unilaterally changing the terms and conditions of its employees prior to bargaining with the Union for a new contract.

B. The Facts

The facts are not in material dispute. On July 3, 1997,¹ the Respondent purchased and took over the operations of the San Diego facility from a predecessor employer, Bekins Moving and Storage Company, Inc. (Bekins or the predecessor), during the term of a collective-bargaining agreement between Bekins and the Union, and continued substantially the same operations of the facility with the same employee complement. The complement of employees covered under the Union's contract with Bekins consisted of only two warehouse employees, namely, Union Shop Steward Patrick Crompton and Bruce Harridge, both of whom continued their employment with the Respondent as explained below. Other employees, not directly involved here, also continued their employment with the Respondent.

Prior to the time the Respondent assumed operations of the facility the two unit employees were initially told by Bekins' management, most of whom were subsequently retained as

¹ All dates or time periods herein are within 1997, unless otherwise specified.

managers of the Respondent, that they would be retained by the Respondent. Further, during the course of several meetings subsequent meetings prior to the Respondent's takeover of the operations of the facility, the two employees were specifically advised that in order to be hired by the Respondent they would be required to submit a new employment application, that they would have to sign an acknowledgment that their employment with the Respondent would be considered to be "at will," and that as such they would no longer enjoy the safeguards under the union contract. In addition, they were advised that their terms and conditions of employment would be changed in accordance with the provisions of the Respondent's "Employee Handbook" which they were given, and that, among other changes, they would be covered by the Respondent's 401(k) plan rather than the Union's pension plan. All these matters, as more fully set forth below, were specifically brought to the attention of the employees, and they were told that if they desired to work for the Respondent they would have to accept these new terms and conditions of employment.

Bekins, by letter dated May 28, wrote to Union Representative Manuel Barbosa, with whom Bekins had negotiated the then current collective-bargaining agreement, as follows:

Please be advised that Bekins Moving & Storage Co. has entered into a tentative agreement to sell the five district offices/branch facilities listed below to a single new buyer.

....

It is my understanding that you are the spokesperson for the Teamsters Locals involved whose members work at our above listed facilities. The purpose of this letter is to notify you of the sale which we believe will close escrow on/or about Monday June 9, 1997. Further, we hereby offer to bargain over the effects of this sale on the Union members working at these facilities.

Although we are not familiar with the precise terms and conditions of employment, we are pleased to learn that continued employment will be offered to all employees currently working under the collective bargaining agreement.

If you wish to bargain over the effects of this decision or wish to discuss the matter further, please feel free to contact me at the telephone number on this letterhead.

At about the same time, sometime in May, one of the unit employees, Shop Steward Patrick Crompton, was told by Bekins General Manager Bill Lovejoy who subsequently became the Respondent's general manager, that Bekins would probably be sold at the end of May or early June and, according to Crompton, that Lovejoy "felt secure that we [Crompton and the other unit employee, Harridge] would be retaining employment because we [the San Diego operation] were doing really well."

On July 2, the Union's business agent, Don Cruickshank, wrote to the Respondent's president and chief executive officer, Chris Carlsson,² as follows:

It is my understanding that you have bought the San Diego Bekins operation. If this is correct, by this letter I am request [sic] Successor bargaining.

Your predecessor was covered by a Collective Bargaining Unit Agreement and as the Successor, you are ob-

ligated to negotiate a Successor Agreement. I have July 22 and 24 available to meet.

Also, as the Successor to Bekins Moving and Storage Co., Inc., you are obligated to maintain all working conditions as is, until a new Agreement is reached.³

The Respondent presented evidence, which stands unrebutted and which I credit, that on the day it purchased and took over the operations of Bekins it was not certain that the two unit employees, who had submitted applications and were told that they had been hired, would in fact come to work for the Respondent. Thus, on several occasions the two employees had voiced their concerns about working for the Respondent, and were particularly unhappy that they would no longer be subject to the Union's pension program. Accordingly, the Respondent had developed contingency plans in the event these employees did not show up for work, and was prepared to hire other employees and/or subcontract the warehouse work. Further, even if the two employees did show up for work, the Respondent had not yet decided whether it would employ additional employees to take the place of subcontractors that had worked in the warehouse at the facility. Thus, the Union's majority status was indefinite and dependent on whether the Respondent decided to hire additional warehouse employees in place of or in addition to the subcontractors.

Carlsson assumed the position of president and CEO of the Respondent on July 3, the date that the Respondent took over the San Diego operations of Bekins. Prior to July 3, a decision was made to change wages and the benefits package, including the vacation policy, health insurance, and the pension program, for all of the Respondent's employees. Regarding pensions, it was decided that each employee, including the unit employees, would participate in a 401(k) plan and that the Respondent would no longer contribute to the Union's pension plan. Further, all employees were to sign an "at will" employment agreement because the Respondent wanted to insure that it had the flexibility to terminate employees promptly and without reservation. Carlsson testified that he did not know whether the two warehousemen were willing to accept employment with the Respondent under the foregoing conditions until they showed up for work on July 3, as they had previously expressed to Bekins General Manager Lovejoy, who continued as the Respondent's general manager, that they were not happy with the situation. Thus, Lovejoy reported to Carlsson that even though the two individuals had submitted employment applications, Lovejoy could not be certain that they would be coming on board. In this regard, according to Carlsson, as of July 3 it had not yet been determined whether the Respondent might be either subcontracting the warehouse work, in the event the two employees did not show up for work, or whether, assuming that they did show up for work, the Respondent would hire two or three additional warehouse employees.

Respondent's general manager, Lovejoy, testified that he and John Black, Lovejoy's immediate superior prior to the Respondent's takeover of the operation, held a meeting with all employees on about June 19, during which they reviewed the Respondent's new employee handbook, point by point, and made it perfectly clear to the employees that the Respondent would be a new operation with new and different terms and conditions of employment, so that there would be no misunderstanding.

² Carlsson was formerly a senior vice president for Bekins.

³ Cruickshank testified that he did not get a response to this letter until about July 18.

Moreover, the employees were told that if they refused to sign the “at will” agreement they would not be employed by the Respondent.

Immediately following this meeting with all the employees, Lovejoy and Black held a separate meeting with the two warehouse employees. The employee handbook was again reviewed and discussed as it pertained to these employees. According to Lovejoy, Union Steward Crampton voiced his strong opposition and was particularly upset with the fact that after more than 20 years as a participant in the Union’s pension fund, he would no longer be a participant in that fund under the Respondent but rather would be a participant in the Respondent’s 401(k) plan. Lovejoy directly told him that his objection was certainly understandable, “but unfortunately that is the deal,” and that he and Harridge should be looking at the situation in a positive manner, namely, that Bekins was going out of business and that they were being given the opportunity of continued employment provided that they agree to be subject to the Respondent’s new terms and conditions of employment.

Thereafter, according to Lovejoy, during subsequent impromptu meetings and discussions, the two employees continued to express their dissatisfaction with what was happening and with the new terms and conditions of employment. This caused Lovejoy to entertain serious doubts whether Crampton and/or Harridge would actually accept employment with the Respondent rather than pursue other alternatives. Lovejoy expressed this view to Carlsson, and testified that he was not certain that Crampton would begin working for the Respondent until he showed up for work on July 3, and that Harridge “probably would” go to work for the Respondent, but he was not entirely sure of Harridge either, as he felt that Harridge might simply follow Crampton’s lead.

Lovejoy testified that he developed contingency plans in the event the warehouse employees did not show up for work on July 3. He spoke to one contractor about the possibility of subcontracting the warehouse work, and also considered hiring two or possibly three replacement employees from the subcontract crews that had worked in the warehouse, in the case that Crampton and/or Harridge decided not to work for the Respondent. And further, he considered the possibility of hiring two or three employees in addition to Crampton and Harridge in order to cover all the shifts and potentially reduce the higher costs of utilizing contract labor. At the time these matters were under consideration, however, Lovejoy was very busy with other concerns involving the start up of the Respondent’s operations, and had not made any definitive decisions regarding the staffing of the warehouse. Since July 3, the Respondent has continued to operate with only the two warehouse employees, namely, Crampton and Harridge, and, in addition, has continued to augment the work force with about two or three subcontract employees on a daily basis.

C. Analysis and Conclusions

The Union requested bargaining with the Respondent by letter dated July 2. The Respondent took over the operations of the predecessor employer on July 3. The General Counsel maintains that the Respondent’s collective-bargaining obligation attached in April or May when the two unit employees were told that they would likely be hired by the Respondent and that, under the holding of *NLRB v. Burns Security Services*, 406 U.S. 272, (1972), the Respondent from that time forth had an

obligation to bargain with the Union prior to changing the two unit employees’ initial terms and conditions of employment.

The Respondent relies on the holding in *Spruce Up Corp.*, 209 NLRB 194 (1974), 318 NLRB 1049 (1995), and *Western Paper Products*, 321 NLRB 828 (1996). In these cases the Board determined that the successor employers had made it clear to the predecessor’s employees, prior to their being hired by the successor, that they were to be hired under new and different terms and conditions of employment, and that under such circumstances the successor was privileged to unilaterally establish new terms and conditions of employment prior to the commencement of bargaining negotiations with the employees’ collective-bargaining representative.

In the instant case the General Counsel contends that it was sufficient that in April or May the employees were told that they would be working for the Respondent, and that this was sufficient to make their subsequent employment relationship with the Respondent “perfectly clear.” Thus, the General Counsel takes the position that what the employees may have been told and/or agreed to regarding the specific terms and conditions of such employment, albeit prior to their being hired by the Respondent, is of no consequence. I do not agree. The Respondent’s managers in April and May, who at that time were also the predecessors managers, were simply responding to the employees’ concerns in order to provide them with current information as plans were being developed regarding the takeover of the operation by the Respondent. In order to assuage the employees’ concerns about their futures with the new entity, and also apparently to retain their services, the employees were advised, in effect, that they need not worry about being laid off. It appears eminently reasonable that during the period when a successor employer is engaged in formulating its business plans to commence operations it should be permitted to provide prospective employees with up to date information regarding future employment without being impeded by arbitrary rules governing such matters.

Here, there is no dispute that prior to their being hired by the Respondent the unit employees were told what their new terms and conditions of employment would be. Further, they were told that they would not be hired by the Respondent unless they specifically accepted these new terms and conditions of employment. In these circumstances, under the authority of the cases cited above by the Respondent, it is clear that the Respondent had no duty to bargain with the Union prior to the establishment of such initial terms and conditions of employment. Accordingly, I shall dismiss this case in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not violated Section 8(a)(5) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

The complaint is dismissed in its entirety.

Board and all objections to them shall be deemed waived for all purposes.